

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JONATHAN SCOTT FOWLER,  
Plaintiff-Appellant,

v

KRISTIN KAY FOWLER, a/k/a KRISTIN KAY  
LAPRAIRIE HANSLOVSKY,

Defendant-Appellee.

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UNPUBLISHED  
April 16, 2002

No. 232580  
Newaygo Circuit Court  
LC No. 98-000744-DM

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JONATHAN SCOTT FOWLER,  
Plaintiff-Appellee,

v

KRISTIN KAY FOWLER, a/k/a KRISTIN KAY  
LAPRAIRIE HANSLOVSKY,

Defendant-Appellant.

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No. 232581  
Newaygo Circuit Court  
LC No. 98-000744-DM

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

In these consolidated appeals, the parties each appeal as of right from a judgment of divorce. We affirm in part, reverse in part, and remand for further proceedings on plaintiff's religious freedom claim.

Plaintiff, a Native American, first challenges a provision in the judgment of divorce that prohibits him from allowing his son<sup>1</sup> to be given peyote “in any Indian ceremony or otherwise.” Plaintiff contends that this provision violates his free exercise rights under the First Amendment of the U.S. Constitution.

The First Amendment of the United States Constitution, which is applicable to the states pursuant to the Fourteenth Amendment, US Const, Am XIV, provides that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” Our Michigan Constitution also contains a Free Exercise clause, Const 1963, art 1, § 4. See *Porth v Roman Catholic Diocese of Kalamazoo*, 209 Mich App 630, 634; 532 NW2d 195 (1995).<sup>2</sup> The concept of “free exercise” is made up of two components: freedom to believe and freedom to act. *Cantwell v Connecticut*, 310 US 296, 303; 60 S Ct 900; 84 L Ed 1213 (1940). “The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” *Id.* at 303-304.

The freedom of choice in matters of family life is a fundamental liberty interest. *Santosky v Kramer*, 455 US 745, 753, 102 S Ct 1388, 1394, 71 L Ed 2d 599 (1982). For example, parents have the right to control the religious upbringing of their children. See *Wisconsin v Yoder*, 406 US 205, 214; 92 S Ct 1526; 32 L Ed 2d 15 (1972). However, during divorce proceedings, courts are invariably called upon to referee parents’ competing preferences regarding the religious upbringing of their children

In light of the Free Exercise clauses of our state and federal constitutions, we have opined that a court may not, in a divorce proceeding, “order the custodial parent to educate the children in a particular faith, just as the noncustodial parent’s right to pursue his or her religious activities and to involve the children in those activities during legal visitation periods cannot be violated.” *Fisher v Fisher*, 118 Mich App 227, 234; 324 NW2d 582 (1982). On the other hand, if the religious practices of either the custodial or noncustodial parent “threaten the children’s well-

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<sup>1</sup> Although the child’s name was changed to “Graydon” below, he is referred to throughout the record as “Teddy.” Therefore, we will refer to him as Teddy herein.

<sup>2</sup> The Michigan Constitution provides as follows:

Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall properly belonging to the state be appropriated for such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief. [Const 1963, art 1, § 4.]

The Michigan Constitution is at least as protective of religious liberty as the United States Constitution. *People v DeJonge (After Remand)*, 442 Mich 266, 273 n 9; 501 NW2d 127 (1993).

being,” the court may interfere with those religious practices. *Id.* Indeed, we noted that it is “difficult to conceive of a more compelling or vital state interest than the welfare of minor children as it is affected by the dissolution of their parents’ civil marriage union. The care and protection of children has long been a matter of utmost state concern.” *Id.* at 232.

Here, although defendant expressed concern that plaintiff would give Teddy peyote, the use of peyote was principally an issue at the custody hearing only insofar as plaintiff, a recovering alcoholic, claimed that his own use during religious ceremonies would neither impact his ability to care for Teddy nor compromise his sobriety. In fact, plaintiff testified at the custody hearing that he did not give peyote to Teddy during religious ceremonies. Because of the posture in which this issue arose at trial, neither party presented any evidence indicating whether it would be harmful for Teddy to use peyote during religious ceremonies. In fact, plaintiff did not request that he be allowed to give peyote to Teddy, nor did he challenge the prohibition in the judgment of divorce against giving Teddy peyote. Under these circumstances, the record is inadequate for us to fully evaluate the extent to which forgoing the practice would burden plaintiff’s religious expression and the extent to which the practice would harm Teddy, essential aspects of the balancing equation for First Amendment purposes. See *Fisher, supra* at 232-234. Therefore, we remand this matter to the trial court for further proceedings on plaintiff’s free exercise claim.<sup>3</sup>

Next, plaintiff argues that the trial court improperly ordered that some of Teddy’s tribal funds be used to pay a portion of the parties’ attorney fees. During the hearing on defendant’s request for attorney fees, plaintiff indicated that he had no objection to Teddy’s tribal funds being used to pay a portion of each party’s attorney fees. Therefore, plaintiff has waived any challenge to this ruling. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *Farm Credit Services v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998).

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Defendant challenges the trial court’s decision to award plaintiff primary physical custody of the minor child. Defendant does not challenge the trial court’s finding that there was no established custodial environment with either party, nor does she specifically challenge any of

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<sup>3</sup> Our ruling not only allows plaintiff the opportunity to establish a burden on his right to free exercise of his religious beliefs, but also gives the trial court an opportunity to fully consider the impact of the use of peyote on Teddy. We note that the state has a compelling interest in protecting Teddy from harm. If, for example, the ingestion of a hallucinogenic drug by a young child would pose a substantial threat to the child’s physical or mental well-being, the care and protection of the child may override the freedom of the parent to engage in religious practices. *Fisher, supra* at 232-235. However, the trial court must decide these issues after a full evidentiary hearing.

Further, in light of our disposition on this issue, we decline to consider plaintiff’s claim that the prohibition against peyote violates plaintiff’s rights under the American Indian Religious Freedom Act (“AIRFA”), 42 USC 1996.

the trial court's findings with regard to the best interests of the child. MCL 722.23. She merely claims that the trial court improperly awarded primary physical custody to plaintiff in light of plaintiff's past criminal behavior. We note, however, that defendant has failed to adequately brief the merits of her claim. Where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Regardless, having reviewed the trial court's detailed findings of fact, we are not persuaded that any of the trial court's factual findings are against the great weight of the evidence. MCL 722.28; See *Fletcher v Fletcher*, 447 Mich 871, 876-879; 526 NW2d 889 (1994). Moreover, although the evidence suggested that both parties were flawed individuals, the evidence indicated that plaintiff was more stable than defendant. Consequently, we do not believe that the trial court abused its discretion by awarding plaintiff primary physical custody. *Id.*

Defendant also claims that the trial judge, Graydon W. Dimkoff, improperly ordered, "sua sponte," that Teddy be "renamed after himself, Graydon." Contrary to defendant's assertion, however, the child's name was a matter of dispute between the parties prior to and during the custody hearing. During the hearing, defendant expressly agreed to change Teddy's name to Graydon. In fact, it was defendant's attorney who first suggested the name Graydon on the record. Defendant agreed with her attorney's suggestion, as did plaintiff. Defendant indicated that she was agreeing to change Teddy's name to Graydon "out of respect" for Judge Dimkoff. Thus, Teddy's name was changed by agreement of the parties, not "sua sponte" by Judge Dimkoff. Because defendant stipulated to the name change, she may not challenge it on appeal. A party cannot request a certain action of the trial court and then argue on appeal that the action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Defendant also objects to the provision in the judgment of divorce which indicates that "by stipulation of the parties . . . the minor child shall be allowed to grow his hair for religious reasons and that neither party shall interfere with said desire to allow the child's hair to grow." Defendant claims that this provision is "objectionable" because "the minor child can and will eventually make up his own mind in regard to the length of his own hair." However, defendant does not dispute that she stipulated to this provision below. Again, defendant's stipulation to this provision prevents her from challenging it on appeal. *McCray*, *supra* at 14.

Lastly, defendant claims that the trial court did not have jurisdiction under the Uniform Child Custody Jurisdiction Act ("UCCJA"), MCL 600.651 *et seq.* We disagree.<sup>4</sup> The UCCJA applies to custody proceedings, which are defined to include any proceeding in which a custody determination is one of several issues to be determined. MCL 600.652(c). Because both parties sought custody of Teddy below, the UCCJA generally applies to this case.

Under the UCCJA, when a child custody dispute is presented, the court must go through a multi-step process in determining whether to exercise jurisdiction. *Braden v Braden*, 217 Mich App 331, 334; 551 NW2d 467 (1996). First, the court must ascertain whether it has jurisdiction

<sup>4</sup> Although defendant initially objected to the trial court's jurisdiction under the UCCJA, defendant consented to jurisdiction under the UCCJA during the jurisdictional hearing. However, an individual may not waive a challenge to a court's subject matter jurisdiction. See *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 744 (2001).

over the case. *Id.* at 334. The court will have jurisdiction if one of several possible statutory alternatives is satisfied. MCL 600.653(1). For example, in *Farrell v Farrell*, 133 Mich App 502, 508; 351 NW2d 219 (1984), we explained that the court will have jurisdiction pursuant to MCL 600.653(1)(b) where the following two “conditions” are satisfied:

(1) it is in the best interest of the child and (2) the child and at least one contestant have a significant connection with Michigan and there is available in Michigan substantial evidence concerning the child’s present or future care, protection, training, and personal relationships.

A child’s best interests are served when the forum has “optimum access to relevant information about the child and the family.” *Bivens v Bivens*, 146 Mich App 223, 232; 379 NW2d 431 (1985).

Here, Teddy and both of his parents had significant connections with Michigan. Plaintiff was a longtime resident of Michigan. Defendant admitted during the jurisdictional hearing that she had been a resident of Michigan from birth until she moved to North Carolina in August 1998, when she was five months pregnant with Teddy. Prior to leaving Michigan, defendant had lived in this state continuously for over five years. She had a job in Michigan, went to school here, received medical treatment in this state, and had family and friends here. Defendant married plaintiff in Michigan and Teddy was conceived here. Defendant received prenatal care in Michigan before moving to North Carolina.

Later, upon discovering defendant’s whereabouts, plaintiff went to North Carolina and brought Teddy back to Michigan. At the time of the jurisdictional hearing, Teddy had been living in Michigan for almost three months. Defendant, who still had a valid Michigan driver’s license at the time of the hearing, moved back to Michigan approximately one month before the hearing. Thus, at the time of the hearing, both contestants and Teddy were residing in Michigan. Under these circumstances, both contestants had significant connections with this state. Additionally, because both contestants had been longtime Michigan residents, and because Teddy and both contestants were residing in Michigan at the time of the jurisdictional hearing, Michigan had optimum access to relevant information about Teddy’s best interests. Therefore, the trial court properly concluded that it had jurisdiction under MCL 600.653(1)(b). See *Farrell*, *supra* at 508-509.

The next inquiry is whether another state also has jurisdiction under the UCCJA. In the instant matter, the parties agreed below that North Carolina was Teddy’s “home state.” Therefore, North Carolina also had jurisdiction under MCL 600.653(1)(a). Where, as here, the court concludes that another state also has jurisdiction, it must then determine if it should actually proceed with the case. *Braden*, *supra* at 335. This determination is governed by MCL 600.656. *Id.* Priority in time of filing ordinarily controls which state is to proceed, provided that the state with priority is exercising jurisdiction substantially in conformity with the UCCJA. *Moore v Moore*, 186 Mich App 220, 224-225; 463 NW2d 230 (1990), quoting MCL 600.656.

Teddy was born in North Carolina on November 16, 1998. On December 18, 1998, plaintiff filed a complaint for divorce in the Newaygo Circuit Court. On March 29, 1999, plaintiff obtained an order from the Newaygo Circuit Court granting him physical custody of Teddy. Plaintiff located defendant and Teddy in August 1999, and brought him back to

Michigan. Defendant did not obtain a custody order from the circuit court in North Carolina until October 12, 1999, eleven months after plaintiff filed his complaint for divorce and seven months after plaintiff obtained a custody order from the Newaygo Circuit Court. Therefore, the Michigan court assumed jurisdiction before the North Carolina court assumed jurisdiction. Thus, it was proper for the Michigan court to proceed with this custody action. *Braden, supra* at 335-337; *Moore, supra* at 224-225. Consequently, we reject defendant's challenge to the trial court's jurisdiction over this case pursuant to the UCCJA.

Affirmed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Jane E. Markey

/s/ Christopher M. Murray